86 1975 (1)

Supreme Court, U.S.
FILED
MAR 23 1987
JOSEPH F. SPANIOL, JR.
CLERK

No....

in the

SUPREME COURT
of the
UNITED STATES OF AMERCIA

March Term 1987
no.

DOUGLAS J. MICHELSON,
petitioner,

vs.

Merrill Lynch Pierce Fenner & Smith,Inc.
respondent,

P E T I T I O N FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

D.J. MICHELSON
MICHELSON METALS
1503 CENTRAL NW.
ALBUQ. NEW MEXICO
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f o r p e t i t i o n e r

41 0 P

QUESTIONS PRESENTED

(1.)May summary judgment be granted against a plaintiff despite genuine issues of material fact, because the court chooses to accept only the evidence of the Plaintiff on his adhesion contract?

(2.) Is there error where the court discharges plaintiff's attorney over his objection, only days before a scheduled jury trial,and then scapgoats him for proceeding on with the matter, by denying him due process, joiner of the correct parties, and awarding a levy in the form of attorney fees against him?

(3.) Is there a private right of action under the Commodities Exchange Act?

(4.)Can the Court of Appeals dismiss an appeal on lower court errors, where appealant advises he is unable to finish the whole appeal in a clearly contrived five days allowed from the time appealant would receive the order and the brief would be due?

(5.) May summary judgment be granted in clear disregard of the rules that all of the matters be tried and where fact logic suporting those left standing makes impossible the findings?

(6.)Is a judgment void where it infringes constitutional rights of the person to due process, an attorney, and a jury trial?

(7.)Where parties are joined to effect execution, must the court then hear all cross claims interposed

against those parties?

(8.) Is it necessary on a judgment on controverted fact to consider the facts behind the claimed insecurity, where no performance ensues?

(9.) Was splitting the suit into two parts improper?

(10.) Was equity properly considered in not staying execution against the defendant, after court created spliting, and matters were still being litigated in the continuation suit?

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JURISDICTIONAL STATEMENT

Douglas J. Michelson ,petitioner, respectfully prays that a writ of certiorari issue to review the order of the United States Court of Appeals for the Tenth Circuit entered in this proceeding on December 23,1986 and those previous to it. That order issued in summary fashion conflicts with the decision of other circuits and the holdings of this court on similar issues. The procedures did not provide a proper review of lower court error and therefore may not have fullfilled the statuatory right of review from lower court error and abuse.

The evidence at the lower court level of a corner in the silver

market, was at best ignored. Great effort was made to disallow effort directed at it. And the distortions and other abuse heaped on appealant by the magistrate did not comport with the parties rights to full and meaningful discovery to provide the evidence in a proper form. There was no transcript or effort at judging the parties contentions, through such time tested methods as observing the witnesses under oath.

PARTIES BELOW

The parties to the proceeding are Merrill Lynch Peirce Fenner & Smith, inc.plaintiff. Douglas J. Michelson, defendant. First National Bank in Albuquerque, added as cross claimant. First Interstate Bank in Albuquerque added as party by Merrill Lynch.

OPINIONS BELOW

The opinion of the District court is not published. It is printed in the appendix at pages "B"

The opinion of the Appealate Court is unpublished. The opinion of the Court of Appeals is attached in the appendix to this petition. This case is covered in three opinions all of which make up the substance of this petition. They are printed in the appendix at pages "A". see full table of contents on appendix.

JURISDICITON

The judgment of the Court of Appeals was entered on December 23,1986. The jurisdiction of this Court is invoked under 28 USC 1254. The opinion of the court of appeals

for the 10th circuit does not conform to the Supreme Court holding.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Constitutional provision involved are Constitutional Amendment number seven involving petitioner right to a jury trail. Constitutional Amendment number fourteen and six as it involves the right to an attorney, and fourteen as it involves due process throughout the proceedings, especially in fairly and timely enforcing and communicating with petitioner to process his suit. Constitutional Amendment number five as it involves the property rights of the defendant. And Constitutional Amendment four.

The statutory provisions involved are the Commodity Exchange Act (7 USC 1 et seq.) especially sections 4, 9 and 13 of the CEA.(7 USC 6, 7 USC 13)

Also the provions under the Antitrust Laws (15 USC 1 et seq.);especially (15 USC 1) as would apply to a corner in the silver market;(15 USC 2) monopolization of the market; (15 USC 4) (15 USC 7) (15 USC 15) as they apply to enforcement of the statutes.

The Federal Rules of Civil procedure are involved as they apply to the proper processing of a "civil suit"; especially as to proper parties and the intent of one form of action.

The Federal Rules of Evidence are involved in improperly excluded evidence.

The New Mexico Common law on contracts and various statutory provisions applicable to affirmative defenses given in the answer.

STATEMENT OF THE CASE

This is a commercial claim arising from the corner in the silver market 1979-80.

PETITIONER, APPEALANT in the Court of Appeals, and DEFENDANT in the lower court operated his business as an individual proprietorship. He was sued by his broker Merrill Lynch for a deficiency in his account remaining after his broker alledgedly liquidated contracts used to hedge in his small metal business. He was forced out at the height of the silver bubble, in opposition to his wishes and financial ability,and after acquience of Merrill Lynch to their call. There was little commercial reality to the liquidation since no performance through the

delivery of metal was ever done. Those accomodating Merrill Lynch in the trade took no position, put up no margin, had no equity interest, or effected no delivery of metal in place of Michelson. A few days after the alledged liquidation, the exchange corrects the excess price through a "liquidation only" order. It is controverted that Merrill Lynch was aware of the correction taking place when he liquidated Michelson. The market returns to it pre-corner price. The Congress of the United States Of America unleashes massive investigations of the market corner.

The mercantile issues, which all seem to have been dismissed in the counterclaims, are essentially the same as those this court has clearly

ruled were not properly dismissed. Nearest,is this courts holding in ---Poller v. CBS,inc. 368 US 464 . On most grounds complained of here, it is clearly the same issue and very much alike in many important features. One of those is it is a regulated area of commerce as was Poller (supra).

Merrill Lynch Pierce Fenner and Smith,inc (hereinafter Merrill Lynch) is one of the largest brokers in the commodity business. Dealers, especially small ones are virtually powerless in acquiesing to the contract demands made upon entry or participation. All must deal through these brokers.

Merrill Lynch imposed these upon Michelson. They claim thereunder to have virtually unlimited rights to

alter conditions, or change demands, effecting the conditions around the basic contract right with little regard to need and in deregation of what would be violative of normal commercial practice. re; acceleration, insecurity, or uncionsionability. Here they have used this contract right to default performance by the clearing house under the "exchange contract". The clearing house is less than an arms length devise utilized in commodity exchange markets to "guarantee performance" between agreed parties.

Up until the Supreme Court ruling in ---Merrill Lynch v. Curran 456 US 353, 72 Led2d 182, the position Merrill Lynch took was one of "no private right of action". This same

stance was taken herein and improperly omitted from the lower courts ruling,after this court clarified it in Curran (supra). Now they imply again, that "no private rights" are to be afforded under the Commodity Exchange Act or the Antitrust Law as the Commodity Account Agreement contractual priviledge is to be taken to be conclusive against acts violative of both the Antitrust Laws as well as the Commodity Exchange Act. This is clearly not the case. Yet the lower court acts as if it is.

Dismissing (all) of the counterclaims without prejudice and acknowledging numerous suits and a class action in New York is the lower courts sole concession to pages of pleading material,and evidence

obtained through other measures, directed at pointing out to the court that there was a corner in the silver market. It is impossible to believe that Judge Bratton had no idea that this kind of predation was afoot. Further, in his (first) opinion he found controverted material fact, which he proceed to ignore. He was required to proceed to a jury trial on it. He would not compel discovery of Merrill Lynch after his dismisal of defendant's attorney, even upon so relevant a matter as "what other suits had Merrill Lynch been sued on for fraud or cornering the silver market.". Which would have show the the extent of the cases of fraud and cornering out at that time. Later it was discovered (without court process)

that as early as October of 1979, class actions suits for cornering the silver market had been filed against Merrill Lynch, the HUNTS and others. The court was in error in not providing this kind of discovery through court process. It catered to the miscarriage of justice in what it denied or would not enforce or wait for.

The Judge ignored an expert opinion that the artifical price question and issues surrounding price in the silver market, impinged upon each of the counts and issues therein and should not be summary judged in this case. This was clearly material facts which made summary judgment impossible. And it was uncontroverted by Merrill Lynch.

The contradiction to good law and practice did not stop with the incursion on the jury right. The lower court in discharging plaintiff's attorney only days before the calendared jury trial, committed error in Constitutional law. After that,the rights of defendant to join the right parties, as most recently defined by this court in Merrill Lynch v. Curran, (supra) are also bypassed by the ruling that there would be no amended counterclaim and that the exchanges and other parties to the corner would not be joined in the matter.

Petitioner, in August of 1982 appealed the ruling disallowing amendment and joiner of the right parties in the counterclaim to the court of appeals which ruled it

interloucutory and sent it back down.

Merrill Lynch had moved for a default judgment on grounds,that would be so unfair as to shock the conscience of the court. By implication of their case law they were claiming use of the judical shield. It was not granted. Yet later the dismissal of the 4b claims,is claimed by Merrill Lynch in res judicata, to be sanctions for and under the default judgment. They turn a magistrate ruling that Michelson should pay Merrill Lynch fourteen hundred dollars for requiring responses to motions, into thirty three thousand dollars awarded for attorney fees. These were wrong by law and excessive by a reasonable standard of what the court pays attorneys.

Merrill Lynch simultaneously files a motion to again summary judge. It is vigorously opposed. It improperly proceeded on no new evidence or considerations, after a summary judgment finding controverted fact.

After the summary judgment ruling, the Court of Appeals again side stepped hearing the issue of whether a proper hearing was had for a Commodities Exchange Act manipulation case, by a procedural ruling leaving appealant five days to write the brief,knowing that it could not be done in that time. It then dismissed for what it termed lack of prosecution, while hearing the appeal taken by Merrill Lynch to affirm. And then the Appeal court denied a

rehearing. The record of motions made for time extensions clearly shows petitioner would have completed the brief within a short time, had the appeal court wanted to rule other than on procedural grounds. It of course should not have affirmed had it gone to the merits or conformed to 'stare decisis' in other particuliars.

Michelson moved the lower court under rule 60 b to void the judgment on grounds of fraud clearly shown. Uncontroverted evidence in the form of a New York District Judge's opinion was submited. Judge Lasker's preliminary opinion was that in the silver market in a related case the price mirage was tantamount to fraud. Additionally uncontroverted evidence was submitted showing that the

constitutional violations of no jury trial, improper removal of an attorney, and due process, made the summary judgment void, and therefore uneforceable under the execution Merrill Lynch requested. Merrill Lynch was continuing their harassment by obtaining a writ of execution under the summary judgment and proceeding to inflict further damage upon Michelson in his relations and business, in a situation which in equity called for it to be resolved at one time. Given the continuation suit the court acknowledged litigation was not at an end. The court should have acted to preserve the status quo. The court instead ruled that the constitutional rights of defendant were not violated , there was no fraud, and that no stay

of execution would be given to prevent manifest injustice.

Additionally, the court dismissed a cross claim against a party after that party was joined in the matter, failing to hear defendants cross claim, yet hearing and acting upon plaintiff's cross claim. Michelson was not allowed to join proper parties for a decision on the merits , yet Merrill Lynch joins who it pleases. This dismissal of the cross claim was wrong. There was no evidence contradicting that submitted with the complaint. It was not on the merits and clearly violated further due process. Hearing plaintiff's cross claims and not defendants cross claims arising from the same acts and situation is not due process. It does

not comport to the Federal Rules as to one form of action nor the equitable principals of limiting litigation by requiring that all claims be included.

Defendant, Michelson again appealed. Was the judgment void under execution for the reasons stated? Should the appealate court remand it for a hearing on the merits? Michelson ask the appeal court to stay the ongoing execution and make the court hear the case properly, including the new claims against joined parties. Merrill Lynch ask again for summary affirmance under procedural rules to deny defendant his right to have the errors reviewed and become or relegate themselves to precedent in the 10th circuit.

It is from that December 23,1986 10th circuit judgment to summary affirm,petitioner appeals. It encompasses the previous lower court summary judgment, and the appeal court's summary affirmance and dismissal of appeal which petitioner contends must have been heard on the merits, but was not.

REASONS FOR GRANTING THE REQUEST

(1.)The Supreme Court must enforce its holding in ---Poller vs. CBS,inc 368 US 464 that summary judgment was not appropriate in this type of commmercial litigation.

Allowing summary judgment wrongly

extends the contractual agreement required of all smaller dealers, to a position of negating the antitrust law in the exchange market. This is clearly not the law as most recently held in ---Strobl. v New York Mercantile Exchange 768 f2d 22,cch 22647, and this court review of treble damages therein.

(2.)The granting of summary judgment in this case negates the effect and intention for the treatment of a proper manipualtion case, as only recently held by this court in ---Merrill Lynch v. Curran 456 US 353, 72 led2d 182.

The lower court disallowed joiner of an exchange in a proper manipulation case in direct conflict with this courts ruling.

(3.)The lower court errored in its review on private right of action.

The lower court did not cite and follow this courts holdings properly in the ruling on "a private right of action" in a commodities case under the Commodity Exchange Act.---Curran (supra)

The effect of judgment is to again create "no private right of action" based on the Commodity Account Agreement,which everyone must sign. This court should not allow the lower court to rule opposite the expressly provided intention just given in ---Curran (supra) that there was a private right of action under various parts of the CEA.

(4.)The appeal court negated its purpose in not reviewing lower court

error in law and abuse.

The appeal court in making a procedural ruling which did effect the substantial rights of the party should have allowed the requested time to complete the appeal, and should have afforded review of each complained of error. The extensive revised docketing statement shows the appeal court that there were a number of areas on which review can be demanded. Its failure to allow briefing of points, left it without knowledge other than this document as to what it should review, and it did not show it review the problems recited in the docketing statement.

The summary affirmance for cross appealant was wrong. Where an unpublished opinion of a controversial

subject, over the objection of appealant to hear his appeal, enforces a lower court summary judgment in questionable circumstances, there is a high likelihood of abuse.

Where facts show that defendant in the lower court has had most of his working capital in his business taken, had his life and livilihood disrupted, and complains of losing his legal rights there is no grounds for a summary procedure as was used here.

Where evidence is shown which is highly reliable that there were problems in the silver market and that does not appear in the opinion, there is reason to review.

The lack of review of case law, cites of authority and other trapings of justice, makes the review procedure

open to question and abuse. By this method of appealate review, reflection of all the reasons for and inherent in law and appeal are lost. Judges in the lower courts may become tyrants who are not subject to review, nor do they need conform to precedent. They only need curry favor among those on the appealate bench to have their cases affirmed. And there will be little attention paid to citizens Constitutional rights, especially those for a jury trial.

(5.)The lower court seriously infrienged the provience of the jury in moving from finding the existence of material facts, and a case seriously controverted, to judging it as if there were no jury demand, and no opposition..

The lower court in failing to provide a jury trial after finding controverted material fact errored.---US v. Jepson Dc NY 1950, 90 fsupp 383.

The lower courts failure to rule on a motion in limine to take judical notice of the Congressional Hearings on the problems in the Silver market is error. Had the lower court reviewed it, its conclusions would have been opposite or clearly different. As it is there is gross neglect in failing to rule twice on a motion asking judicial notice. And error in ignoring a market that was manipulated.

The lower court in failing to properly account for and review defendant's expert opinion that price

was a key issue in the various counts and that the circumstances surrounding the price were in need of extensive review, was lack of fair consideration of material facts. Merrill Lynch submitted no expert opinion on price,so the effect is conclusive on "price facts".

The lower court after ordering a pre-trial order could only conclude from Merrill Lynch's briefing to the court, that the issues enumerated by petitioner were almost to a one controverted. Thus the lower court failed at this critical time to take proper consideration of admissions by Merrill Lynch that the issues and facts which made up the issues in the pre-trial order, were material and controverted.

The lower court errored or exagerated certain phrases which leave the impression of lack of diligent prosecution in controverting or challenging the evidence as it was made. This was simply not the case in the record.

The lower court errored and appeal court failed to reveiw, if the "recently found evidence" which was sworn to by a Merrill Lynch person, was on personal knowledge of the transaction, or was that person even employeed at the time. Both facts were challenged. This goes to the inherent problems of summary judgment from lawyer drawn affidavits.

(6.) The lower court did not fairly or properly consider the circumstances, in his opinion on fraud

(4b) charges.

It does not look at the basis for the action, which was an artifical price. This is especially true with regard to the claimed insecurity of plaintiff. The review of the actions is pretty illogical considering the uncontroverted facts on price which were put in the record by defendant's expert. In order to have issued correct margin calls, they had to be based on correct prices. Merrill Lynch issued theirs based on artifical prices. And that was the basis of fraud.

It is also true for the backdating of margin calls, to make them appear due earlier than otherwise. The need for acceleration is argued in the continuation suit as

being in violation of New Mexico state law.

Those claims going forward show that all is not resolved herein. It was a partial judgment on controverted material fact relative to fraud, which should not have been summary judged.

(7.) The spliting of the suit into various parts was unfairly done and imposes an unfair burden on defendant to go forward in a distant district. It mascarades to allow the improperly judged part,to bypass the jury, and gain a life of its own in resjudicata. The continuation suit filed when proper parties would not be joined herein,and transfered to New York for consoldiated processing with other related silver suits, should not be subject to an improper summary

judgment striking claims on the basis of resjudicata. The court should remand for trial on all the issues.

CONCLUSION

The over use of summary procedure has left its mark on petitioner by taking his business and livlihood worth several million dollars without so much as a hearing. Petitioner claims and the record shows,that his attorney was removed by the court over his objection. And then his jury trial was canceled. The lower court cannot be said to have reviewed the evidence and facts or circumstances giving rise to this suit. It does not seem to have

been provided where critical motions directed to evidence are not even ruled upon. Or where discovery request are not complied with and when compeled denied for the wrong reasons. And most assuredly,when you have findings under the imprimatur of the CONGRESS of the UNITED STATES OF AMERICA,and mountains of documents, and hearing depositions,and other key evidence from the overseeing regulator, yet it all goes unmentioned. There you have a case which lacked proper process.

It is not often that this court gets to see the abuse of the lower court against such a controversial and questionable background. Or to recognize how the system then through its attorneys refuses further process.

It likes to cover up too.

The lack of appealate review which could have corrected some of the problems is apparent. Instead they chose to not hear the errors, or may have felt it did what it could in denying the request of Merrill Lynch to make it all res judicata.

This court can correct the wrong, as it has in the past in Poller and other cases, so that proper hearings and meaningful discovery is provided, to allow the court to reach a properly adjudicated decision.

respectfully submited,

D.J.Michelson

as of March 20,1987
Albuquerque, New Mexico

May 5,1986

86 1975 (2)

Supreme Court, U.S.
FILED
MAR 23 1987
JOSEPH F. SPANIOL, JR.
CLERK

No....

in the

SUPREME COURT
of the
UNITED STATES OF AMERCIA

March Term 1987
no.

DOUGLAS J. MICHELSON,
petitioner,

vs.

Merrill Lynch Pierce Fenner & Smith,Inc.
respondent,

A P P E N D I X A' AND B' TO PETITION FOR WRIT OF CERTIORARI TO THE US COURT OF APPEALS FOR THE TENTH CIRCUIT

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145 pp

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APPENDIX A

Opinion

United States Court of Appeals for the TENTH Circuit. No 85-2324 (D.C. no 80-095HB) D. N. M. Merrill Lynch Pierce Fenner and Smith, Incorporated, a Delaware Corporation, Plaifntiff, Appellee, vs. Douglas J. Michelson, Defendant-Counterclaimant, Appellant, First Interstate Bank of Albuquerque, and First National Bank In Albuquerque, Garnishees.

Filed:December 23,1986

Appeal from the United States District Court for the Dist of New Mexico , Howard Bratton, District Judge, Presiding

Before Logan and Moore, Circuit Judges and Richard D. Rogers, District

Judge for the District of Kansas (sitting by designation). No argument allowed.

In accordance with 10th cir r. 9(e) and Fed R. App. P. 34(a), this appeal came on for consideration on the briefs and record on appeal .

This action is before the court on plaintiff's motion to affirm and defendant's response.

Defendant filed a motion to vacate judgment pursuant to Fed. R. Civ.P. 60 (b) and a motion to stay execution of the judgment pursuant to Fed R. Civ. P. 62(b). He alledged that the district court's judgment was void because the district court denied his rights to a jury trial, counsel, and due process. Also, defendants asserted that the Federal District Court for the Southern

District of New York was the proper court to enter a final judgment.

The district court denied the motions to vacate and to stay execution. In finding that plaintiff had failed to prove the judgement was void, the district court determined that defendant's consitutional rights had not been violated. Also, the district court determined that all of defendant's allegations could have been raised in and considered by the court of appeals if defendant had diligently prosecuted his appeal. Defendant appealed.

Plaintiff filed a motion to affirm arguing that the district court appropriately refused to vacate its judgment. In his response, defendant argues that there has been no proper decision on the merits in this action.

Defendant also continues to raise the same grounds for relief asserted in the Rule 60(b) motion.

Upon consideration of plaintiff's motion to affirm, defendant's response, and the record on appeal, we conclude the district court corrrectly refused to vacate its judgment or grant a stay of execution.

Plaintiff's motion to affirm is GRANTED. The judgment of the United States Court for the Dsitrict of New Mexico is AFFIRMED. See 10th cir R. 17(b).

The mandate shall issue forthwith.

ENTERED FOR THE COURT PER CURIAM.

IN THE UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

Merrill Lynch Pierce Fenner & Smith,INC,

appellee,

vs. no.85-

DOUGLAS J. MICHELSON,

APPELLLANT,

S U P P L E M E N T A L

D O C K E T I N G S T A T E M E N T

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IN THE UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

Merrill Lynch Pierce Fenner & Smith,INC,

appellee,

vs. no.85-

DOUGLAS J. MICHELSON,

APPELLLANT,

This case has been on appeal to this court before. It is here again because of the failure of the lower court to provide the Constitutional Rights of the defendant in the proceeding. It is also here from the rulings of the court which conflict with established Supreme Court precedent. It is marked by a lack of due process in the proceedings and hearings, as well as appeal.These of course must be corrected to allow further and valid processing of

the suit. As it is now , the judgment is void.

And while the appellate court did provide a ruling on Merrill Lynch's brief, it was not on the subject of the appeal and did not address the error of law of the lower court nor act to provide consistency with the Supreme Court precedent only recently given.

The dismissal for failure to prosecute was from the request of defendant to be allowed sufficient time to do an appeal. In not allowing the presentation of the error it is hardly sufficiently review to fullfill the statute providing appeal. The dismissal improperly bypassed the error required to be corrected. It thus became and remains a void judgment.

While many of the important errors

of the lower court are correctly pointed out in the motion for rehearing granted appellant on the dismissal of his appeal, it does not mean that the court therein considered them on their merits, or provided correction to the lower court for their errors. Had it done that this would not be as necessary.

The court did provide opinion and cases to buttress its overruling those which appellate provided the court and which clearly apply. In order for so important a case to be fully considered the court should provide in its opinion those cases it relies upon to provide the understanding of the law or substance of the ruling. The court cannot, as it did, ignore the Supreme Court cases of precedent, and not provide or uphold the constitutional

rights of the appellant. Such as was done.

Therefore there is here again another chance for the court to approach the problem with a clear adherence to law and precedent, as applied to the substancial rights in the appeal, as applies to the law of following the precedent cases established by the Supreme Court and not the procedural problems which are so easily created.There is clearly no way the Constitutional infirmaties can be again sidesteped. Until they are corrected the judgment remains void.

Procedural Problems

The suit and the counterclaims underlying the appeal were originally filed in 1980. Merrill Lynch claims to

be collecting a deficiency in a commodities account caused by their insecurity.The counterclaim clearly alledges a corner in the silver market brought about the situation and raises the affiramative defense of fraud, antitrust, breech of contract and others,necessary to the proper prosecution of the suit.

It is impossible to properly split the suit as the lower court has done. It must be all heard together.

The background facts of a corner in the silver market, clearly became the main point of the case.This case is one of many from the corner in the Silver market in late 1979 and 1980 run by Nelson Bunker Hunt, Merrill Lynch and others, which was investigated by the Congress of the United States and other

Agencies of Government. Clearly with this background the case is one which deserves, indeed requires more than the cursory summary judgment based on no witnesses, no hearings, no discovery , and numerous other errors. Default judgment from a pre-trail order listing numerous issues in need of resolution and three pages of witness which could testify on the various aspects of the case is not proper.

Jurisdictional problems and due process problems arise from the earliest ruling of the lower court in their opinion of February 1980 which disallowed the exchanges as necessary parties. This was not then corrected when the Supreme court ruled in Merrill Lynch v. Curran and appellant through proper motion,ask that the counterclaim

be properly tried with all necessary parties, including the aforementioned Exchanges, who were liable to a proper suit for their actions.

The 10th Circuit ruled that the matter was interlocutory and not then appealable. They did not then correct the lower court or rule on the matter as they must here. So a continuation suit was filed which included the necessary parties. Michelson v. Merrill Lynch, et al 83-1099M now 83-8898 MEL (SDNY) The 10th circuit took to by passing the ruling herein by dismissal of the appeal.Certainly it was not considered with the rush product of appellee, upon which the court claims to have ruled.

It must be resolved herein in order for the judgment appellee acts from to be other than void. And it must be

resolved correctly by adherence to Supreme Court precedent. Defendants rights as guaranteed to him in the Constitutiton of the United States must be provided. A jury trail should ensue on these points, preferably in the continuation suit in New York, if not then two will be necessary.

Additionally the court should consider the revised docketing statement of appellant which is incldued hereafter.

APPENDIX A

Opinion

United States Court of Appeals for the TENTH Circuit. No 83-2473 and 83-2595 (D.C. no 80-095HB) D. N. M. Merrill Lynch Pierce Fenner and Smith, Incorporated, a Delaware Corporation, Plaintiff, Appellee, vs. Douglas J. Michelson, Defendant-Counterclaimant, Appellant

Filed:APRIL 4,1985 MARCH TERM

IN Appeal from the United States District Court for the District of New Mexico , Howard Bratton, District Judge, Presiding

Before Honorable James E. Barrett, Honorable Oliver Seth, and Honorable Monroe G. McKay, Circuit Judges

This matter comes on for

consideration of the petition for rehearing filed by defendant-appellant /cross appellee, Douglas J. Michelson, which we also construe as a petition to recall the mandate. The court has also considered the "Motion to Permit Answer to Petition for Rehearing" filed by plaintiff-appellee/cross-appellant, Merrill Lynch Pierce Fenner and Smith, Incorporated. The court has considered the petition for rehearing on the merits, and finding no basis to grant the petition, the petition to recall the mandate is denied.

The "Motion to Permit Answer to Petition for Rehearing" is also denied.

Howard K. Phillips, clerk

IN THE UNITED STATES COURT OF APPEALS

TENTH CIRCUIT

MERRILL LYNCH PIERCE FENNER & SMITH,INC.

appellee,cross

appellant

v. 83-2473,2595

Douglas J. Michelson

appellant,cross

appellee

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IN THE UNITED STATES COURT OF APPEALS

TENTH CIRCUIT

MERRILL LYNCH PIERCE FENNER & SMITH,INC.

appellee,cross appellant

v. 83-2473,2595

Douglas J. Michelson

appellant,cross appellee

M O T I O N F O R R E H E A R I N G

Pursuant to rule 40 of the Federal Rules of Appellate Procedure, petitioner

ask that the court rehear his brief. As good cause petitoner would show the following:

1. there has never been a proper hearing on appellant's brief.

2. there was insufficient time provided to correctly do a brief, and further misunderstandings as to the time and procedures allowed.

3. there were errors made apparent in the docketing statement and in the motion to dismiss submitted to the court which the court failed to recognize, which will demand remand upon being put in a brief. It will guide the lower court as to the trial of the matter.

4. there remain ommitted items necessary to the appeal.

5. there is the very real possiblity of a fraud on the court and

or complicated rulings on res judicata and collateral estopple which should not stand from findings other than from a jury trial.

6. there was no jury trial and is no proper record for the court to review, as is appellants constitutionally guaranteed right.

7. there is a continuation suit in New York for the proper prosecution of the matters. By this court remanding for transfer to New York for consoldiation there will be no intra-district conflicts from various rulings on similar matters.

8. Counsel believe that upon reasoned and professional judgement that the panel decision is contrary to precedent by the Supreme Court.

9. the judgment is irregular in

nomenclature and void.

10.the lower court abused appelant.

11.see brief.

WHEREFORE petitioner ask that the panel vacate the ruling, and (1) remand with instructions to the lower court to transfer for inclusion in the continuation suit. or (2)remand with instructions to try the matters before a jury because the order is interlocutory. or (3.) hear the appeal on a properly prepared brief of appellant with oral arguments, which petitioner will submit in four months. Petitioner ask that the ruling on the determination that the motion to dismiss is not allowed be

substanciated with the authority the court relied upon. Petitioner request that the matter by published.

IN THE UNITED STATES COURT OF APPEALS

TENTH CIRCUIT

MERRILL LYNCH PIERCE FENNER & SMITH,INC.

appellee,cross appellant

v. 83-2473,2595

Douglas J. Michelson

appellant,cross appellee

M E M O R A N D U M B R I E F

on petition pursuant to rule 40 for rehearing

STATEMENT

Petitioner, appellant respectfully ask the court in this petition to rehear his appeal in the regular manner pursuant to the rules as applied to most appeals where the persons "life and liberty" ---USCA Constitutional Amendment 5 & 14---is at stake and which allow a modicum of time to present the arguments to the court so that on remand the lower court has the full scope of what is necessarily covered in the appeal order. Petitioner ask the court to fully review the lower court in seeing that his constitutional rights have not been infrienged and have fully been provided and protected by the lower court. Petitioner ask that the rulings be reviewed for other errors as more fully explained below.

The appeal from the lower court is after the order titled "final judgment" of October 24,1983 was entered. It was timely taken to this court and filed November 9,1983. This was after confused rulings by the lower court which both dismissed part and granted part after several previous ruling which raise questions of law properly heard by a jury and therefore properly remanded from here. All rulings of the lower court which were leading to a jury trial are then receded from and a confused summary judgment and default motion is heard.The jury trial is again bypassed.

Appellant was forced by the court titling it "final judgment" and the court vacating a jury trial to file this appeal. Appellant filed a short docketing statement with notice of

previous appealate review of a joiner matter. Certain documents of the lower court were desiginated as the record on appeal and filed. THERE ARE NO TRANSCRIPTS OR RECORDS OF A HEARING ON THE MERITS as there was none.Arrangements with the court reporter was made for records of counsel conference with the judge. All have not yet been included. All counsel conferences do not have records. It is represented by the lower court that they do not need to be of record. It is contested that any part of them form a proper part of a hearing on the merits.It is totally a collateral matter, and absent all hearings should form no part of a proper judgment. A proper extension to file the proper record was ask for and granted on

January 19,1983. Appellee had filed a cross appeal.

A revised docketing statement was filed with the court showing the major areas of appeal and the lower court procedural problems. It also outlines for the court the unnecessary complexity the splitting has caused. And it covers the possible effect on other cases of similar matter, in New York.

A motion to dismiss the appeal " and cross appeal" was filed, asking that the matter be handled with the continuation suit in New York. The court was shown the plain error of twice by passing the jury trial.The motion was briefed by appellant and appellee. It is a curiosity that the court now dismisses what before it was asked to dismiss or remand. This adds what is

necessary for reharing as it has confused the " right" of appeal. Appellant only wants one jury trial on his matter before a court of law where all can be heard. Accordingly he only wants one appeal.

Appellee then extends the time for various reasons including inadvertently ommitted items. We concur and try working together on a rule 10 motion before the lower court and in the transcription of certain tapes. There remain ommitted items which are necessary to the appeal.

On a case where the record is two thousand pages of motion practice and the errors of no hearings and problems is manifest (demanding remand for a jury trial), the clerk in error assigns it to a calendar "C". Now whether this is

done because appeallant is pro se , not an attorney registered with the court or for whatever reason, it does in this case bias and improperly abuse the right of appeal. Appellant objected to this. He noted that simultaneous briefs are wrong, and infringe the right of response, which in the process is suppose to be the essense of practitioners help to the court. see ---Bergman v. Alumnium Lock Shingle Corp of America ---CA OR 1958, 251 f2d 801.Where are the so valued arguments of law?

By right, appeallant can ask the court of appeals to correct those errors of law and fact made in the lower court. In order to do this the court must know what those are and do this by allowing time to put it in proper form for

appeal. ---Fishbaugh v. Armour co.----CA MO 1950, 185 f2d 541, cert denied 22 s. ct. 361 , 342 US 914 , 96 led 683, rehearing denied 72 s. ct. 563 , 342 US 950 , 96 led 706, There is no way that injustice or harm would result in allowing it, as all is ongoing in the continuation suit. This litigation is not at an end. By remanding it for inclusion in the continuation suit the court eases the burden of ruling on res judicata or collateral estopple.The court has not allowed this but manipulated the time and confused the rulings so as to disqualify a proper appeal.

Appellant was given eleven days of record to complete his appeal -from July 19 to July 30. This amount of time was inadequate. Any document so prepared was

almost of no use to the court. It improperly bias the process. No brief was then done by appellant, relying instead on the documents of record, and adequate time to do a proper appeal. Cross appellee working for a huge firm prepares their rush product. In any normal appeal the time between transmital of the record and calendaring it for argument is a good six months. I ask for half that and was denied it. The court should recognize its own abuse.

At the end of the previously ask for time,I again ask to be allowed to do an appeal, and to grant the time necessary for it to be done properly. It was denied. see Intenational Brotherhood of Teamsters, Chauffers , Warhousemen, and Helpers of America vs. US CANC 1959

272 f2d 11.

Appellant would like to do the appeal with the assurance of the court that the matters of fact or law then will not be carried over to ruin the continuation suit. Further it is right that it be ruled according to law, and appellants constiutionally guaranteed rights. see ---US v. Edwards---CANY 1966, 366 f2d 853, certiorari denied 87 s. ct 82, 882, 386 US 908, 919, 17 led 2d 782, 790.

Other shortstops have made a farse of his "rights". If the court wants two trials, then it must say what they will be on, and then provide them.The fact that there is mixed law and fact which must be found by a jury --- USCA Constitutional Amendment #7---in this type of proceeding,really bodes for

leaving all for one suit.To have this appeal affirm the taking from the jury of certain matters and then find law and fact used in the continuation suit under the doctrines of resjudicata or collateral estoppel is to have error compound error. Injustice results in the fraud never being heard by a jury.

This appeal is taken to enforce appealants constitutionally guaranteed rights. Perhaps the abuse was in this courts' view "venting", or some similiar euphemism. This type of judicial abuse followed by dismissal does not accord with appellants good faith efforts to properly prosecute the matter to a full conclusion. The court must recognize that the lower court could have well tried the case before a jury with prior counsel at little additional cost and

expense.

The court should be mindful of the injustice they may do the community in not allowing Merrill Lynch to be subject to a public trial. They may prey again on the public. see Merrill Lynch in Balwin -United Corp. (class actions) DC NY before Judge Brieant.

ARGUMENT

(a.)

APPEALATE PROCEDURE AND RULING FAILED TO PROVIDE A CITIZEN HIS CONSTITUTIONALLY PROTECTED REVIEW OF LOWER COURT ERRORS.

Appeal, a statutory right afforded litigants from errors of the district court under 28 USC 1291 was denied appellant by unfairly manipulating time constraints and mishandling of the rules.

The first leg of this error was committed in the ruling that the order was final, when it was clear there had been no hearings on the merits, there was no transcript of proceedings which the court could reveiw, and the matter is one of which the usual course is clearly a trial after finding controverted material fact.The arguments of law presented (see motion to dimiss) clearly showed the appeallate court ,that interlocutory order was the precendent ruling, and that there would be no problems brought about by the remand for inclusion in the continuation suit. The recent guidance of the Supreme Court in ---Merrill Lynch vs. Curan---456 US 353, 72 LED2D 182,in matter of private right under 4b,as regards a manipulation in the market and

actions against an exchange or other conspirators which must be included in one suit, were not followed in this matter. Given the courts awareness of other suits and Congressional actions ,it should not have affirmed.

The second leg of the error is the assignment of it to calendar "C". This might have been called for by the manifest error of no jury trial, and no transcript record on the merits, if the court had intended to remand it back to cure these errors. By this it could have expedite it and made clear what the trial court was to act upon and what part would be in the continuation suit.

To have calendared it on "C" with only eleven days to complete a full"appeal"was to ask that injustice be self inflicted. There was no time to

properly do the appeal. There was no time to properly present the errors, which if not presented might be precluded.

While calendar "C" claims no prejudice to cases so calendared, the nature of the cases , handling of the procedures and time constraints ,in this case did severly bias. One can look at the slim record of cases afforded review of the errors being allowed under local rule 9e and the "dearth of the appeallate case load problems" which are so relegated. i.e. pro se appeals from criminals. One finds few cases fairly heard so as to be able to guide the lower court on remand. One finds it all to common that it is put there because it is then "OK"to summarily dismiss or dispose of pro se cases,without review

of the errors.contra,---Williams v Wainwright ca Fla 1969 , 414 f2d 806---being one of the better ones. Contra,---Sinclair v. Turner---USCA 10th 1971 , 447 f2d 1161. If the court were now ask to present the "errors" which it did review it would have none, or it shows no where to having reviewed any. Those rulings it did make in the matter of the motion to dismiss cite no authority or further review in the final ruling with reference to authority. Why so? Because the authority cited by appellant and all the facts say it is interlocutory? We distinguish this appeal in that appealant was never afforded a hearing on the merits ,is not a criminal and has adhered to all the regular rules for appeal.

The third leg of the errors is that

time should have been allowed to do a proper appeal and that would have been at least ninety days. CF. Weinberger v. group CA Puerto Rico 1964 339 F2d 34.Appeallate admits he was unable to write the appeal in the time provided, and could not comply with the court directing it be done. Courts usually prefer to deal with the merits of the controversy. see ---Matsumura v. Higgins---Mont. 1911 187 f 601 , 109 cca 431. They should have here. see also ---International Brotherhood of Teamsters Chauffers ,Warehousemen and Helpers of America v. US---CANC 1959 272 f2d 11. This court is no different and should have allowed it.

The law provides appealant a court which will review and correct lower court errors and insure that its

citizens are equally affored the opportunity to have their constitutional rights. Contra, ---US v. Johnson---, 327 US 106, 66 s. ct. 464, 90 led 562. In order that this be other than a farse , a rubber stamp for the lower courts , or a make money deal for the attorneys, it must hear cases which present error and which show the marks of abuse from the lower courts as herein. This court made no effort to rule upon the many error and abuses cited which were described in the REVISED DOCKET SHEET. The court should have used this , absent waiting for the brief, to review the errors, its duty under the law. There never was a review sufficient to have accorded the citizen his rights under the law.

Appellant was denied his right of appeal and it should be restored him.

(b)

WHETHER THE PERCURIUM AFFIRMANCE , WITHOUT OPINION , OF A LOWER COURT ORDER OF MAINLY DICTA, AND WHICH IS UNPUBLISHED,CONFORMS WITH THE RIGHT OF TRIAL AND APPEAL AND PROPERLY SUBORDINATES THE LOWER COURT TO SUPREME COURT PRECEDENT.

Counsel believes that upon reasoned and professional judgement that the panel decision is contrary to precedent established by the Supreme court in ---Merrill Lynch v. Curran---456 US 353, 72 Led 2d 182, for the proper handling of a manipulation, fraud case under the Commodity Exchange Act.

The Supreme Court of the United States in Merrill Lynch v. Curran

(supra) ,laid out appellants rights under the Commodity Exchange Act. The lower court bypassed ruling on a private right of action, which was favorable to defendant in the lower court, despite the duty to so rule.

The lower court further conflicted with the supreme court rulings (see page 394)in not allowing joiner of exchanges and conspirators in this major manipulation case. This court when previously asked to review that decision, would not , ruling the order interlocutory. Now this court again sidesteps ruling on the proper parties to this suit, by dismissal of the appeal.

The lower court wants to exercise its authority in a way that clearly by passes the prescedent case under 4b

(7 USC 6) in this district by its dicta and through abridgement of appellant's constitutional rights--- see. Zenith Radio v. Matsushita Elec. Ind.co.---478 FS 901.

(c.)

WHETHER THIS CASE WITH COMMON ISSUES OF PRICE AND ITS EFFECT ON MANY MATERIAL FACTS WAS ONE POSSIBLE TO BE SPLIT AND TRIED AS TWO MATTERS AND WHETHER THAT PRESENTS INTRA-CIRCUIT CONFLICTS IN SIMILAR MATTERS.

The Court has misapprehended the lower court rulings because of their confused and often improper nature. This court in its Order and Judgment speaks of the lower court "awarding damages in the principal sum of $117, 806.19 together with interest and

reasonable attorney's fees in the sum of $33,335.70." and affirms. There were no damages and the award of attorney's fees is contrary to law.

Damages have a very specific meaning and that meaning is not proper under the claims assert by the plaintiff. There was no evidence adduced to support the findings. All is dicta. So the absense of jury trial, what it is and questions surrounding it void any award ---US v. Jepson, DC NY 1950 90 f supp 983---.

The above shows the court of appeals that the lower court has not properly done its job. Also what the debt supposedly arises from and the method in which it arises is contested. How it arises and Merrill Lynch's overreaching is the basis of many of the

claims which have been asserted under 4b. The facts and the law (contract) show that their was nothing to "buy" or sell in closing out the account; that it could not be done in a disrupted market (Congressional findings have so described it); absent ratification it is fraud;that none of the individuals participating in the closing , had money sufficient to post for margin ; posted it; or did anything but provide an accommodation trade. They all testified that they did not intend to contract to buy silver, stand in Michelson's place, and all immediately or within the day reversed the transactions purportedly relied upon. Nor was it identifiable to Michelson. The lower court,in error,would not wait upon the depositions. Because the facts are

common with the claims allowed to be prosecuted, there can be only one trial on the matter. This matter is part of an episode high on a scale of national import. see McCulloch v. Sociedad Nacional de Marrineros Honduras,---372 US 10,17, 83 s.ct. 671, 675, 9 led 2d 547, 652, (1963).

The court cannot ignore the common thread of "price" in its relation between all the charges. The margin calls which Merrill Lynch says it relied upon and were proper,cannot have been proper as they were all made based on an artifical or false price. Price has its proper place in the charges under the antitrust laws. There are many complex economic arguments it is the duty of the lower court to hear and many areas will be further complicated by any ruling

herein.Price has its proper place in the charges under the fraud on the market or price mirage rulings the court in New York has made finding it tanatmount to fraud, which we wish to add or adapt. Price has its place in the accomodation trade charges. Price has its place in the breech of contract claims. Price and their controlling it , and it then controlling the liquidation certaily has a place in the fiduciary duties imposed upon an investment bank. Sudden movements in price or its unconscionability have their place in a continuation suit.The appellate court cannot due justice by affirming the acts of a lower court which were in error and thereby possibly provide the basis for endless arguments under resjudicata or collateral estopple. The lower court

failed to properly assess the facts in the manner most favorable to non movant and after finding contested material facts, did not set a trial on the matters before a jury.---USCA Constitional Amendment # 7$ 14---.

At the most the lower court could have found that Merrill Lynch says it is owed money on an account. This and other facts necessary to it were controverted, or shown to be false.

This court should not provide fuel to already complex arguments on price or any price related subject or area, or which might be inferred or otherwise connected. In providing a ruling the lower court inadvertently complicates the latter issues which it leaves, knowing they have been transferred to New York. The proper thing is to leave

it for trial therein.

(d.)

IMPROPER REMOVAL OF APPELLANTS ATTORNEY AND THEN FINDING THAT DEFENDANT IS NOT CAPABLE OF PROCESSING HIS CLAIM CLEARLY SHOWS THE APPELLATE COURT THE ERROR AND ABUSE OF THE LOWER COURT AND INFRINGEMENT OF HIS CONSTITUTIONAL RIGHTS.

Appellant clearly opposed the removal of his attorney. Appellant has the constitutionally protected right to an attorney ---USCA Constitutional Amendment # 6 & 14---and it was clearly denighed him.

It interferred with the attorneys obligation to try the case before a jury, increased the cost of the litigation, and denied his

constitutional rights.

The remarks, treatment and inferences from acts and demeanor,etc.show improper abuse of appellant.Positive rule violations by the magistrate,and violations of the ethics of the profession and standards of professional conduct by opposing counsel and other problems show the court that appellant was not accorded the professional standing of an attorney. He was baited, badgered, and the Federal Rules which accord discovery to the party were not complied with and used to abuse him.

Appellant has the constitutionally protected right to an attorney. This constitutional right must be construed so that it includes that any act which can be usually performed by an attorney

, must be performed by the court in the same manner and in timely fashion for a pro se party. This would include, timely hearings on motions, proper notice, service of process, in camera hearings, counsel conferences, enforcement of laws as regards witnesses, depositons, interrogatories,supeonas, and other discovery devises and matters,as well as respect, common courtesy, and truthful answers within the courts knowledge.

Failure to fairly enforce the parties rights in regard to discovery are positive acts in violation of the law. Rule 26, FRCP,(28 USC 26) and those other discovery rules have the full force and effect of statutory law. They cannot be ignored and abused as they were in this case. The lower court has a positive mandate to enforce the

law, and in this respect it knowingly did not and would not enforce it so as to insure appellant to his constituional right to an attorney.

Failure to hear properly, and timely, the motions of the parties, made a farse out of the processing of the case and infrienged his right to an attorney.

The continual undermining of the appellant by statements of the judge unsupported by hearings in the record work and injustice in the matter, which whether planned or not is not and would not be done to an attorney in similar circumstances.

Respectfully submitted,

APPENDIX A

Opinion

United States Court of Appeals for the TENTH Circuit. No 83-2473 and 83-2595 (D.C. no 80-095HB) D. N. M. Merrill Lynch Pierce Fenner and Smith, Incorporated, a Delaware Corporation, Plaintiff, Appellee, vs. Douglas J. Michelson, Defendant-Counterclaimant, Appellant

Filed:Jan 22,1985

Appeal from the United States District Court for the District of New Mexico , Howard Bratton, District Judge, Presiding

Before Honorable James E. Barrett, Honorable Oliver Seth, and Honorable Monroe G. McKay, Circuit Judges

In accordance with 10th Cir. R.

9(e) and Fed R. App. P. 34(a), this appeal and cross appeal came on for consideration on the briefs and record on appeal.

This an appeal and cross-appeal from an order of the district court granting summary judgment in favor of plaintiff and awarding damages in the principal sum of $117,806.19 together with interest and reasonable attorney's fees in the sum of $33,335.70.

In his answer,defendant asserted sixteen counterclaims. Defendant's counterclaims alleged breach of contract, violation of general provisions of the Commodities Exchange Act, 7 USC 1, negligent misrepresentation, fraud, and claims under the Sherman and Clayton Acts. All of the defendant's claims were

subsequently dismissed. The district court dismissed with prejudice Counts I through VIII and Counts XIII through XV of defendants "Amended Counterclaim." Counts IX through XII and Count XVI of defendant's amended counterclaim were dismissed without prejudice as a result of defendant's repeated failures to comply with orders of the court.

Plaintiff took a cross-appeal from the district court's dismissal of defendant's Amended Counterclaims IX-XII and XVI without prejudice. The cross-appeal focuses on whether the district court appropriately dismissed five of defendant's counterclaims wihtout prejudice. The decision of whether to dismiss claims with or without prejudice is a matter within the discretion of the district court and

will be overturned only if there has been an abuse of discretion. See Holloway v. United States, 734 f2d 506 (10th Cir. 1984). The district court acted "out of an abundance of fairness" in allowing the dismissal without prejudice. Because the counterclaims are similar to claims in suits pending before federal courts in New York and because defendant suggested that these claims may be transferred to New York for consolidation or as part of a class action, the court sought to enable defendant to place his claims in a posture where they would be considered on the merits. In doing so, the district court did not abuse its discretion. See 10th Cir R. 17(b) and 10th Cir. R. 15

The judgment of the United States District Court for the District of New

Mexico is AFFIRMED in plaintiff's cross -appeal no.83-2595.

Defendant's cross appeal No.83-2473 is DISMISSED for failure to prosecute.

The mandates shall issue forthwith.

Howard K. Phillips, clerk

APPENDIX A

Opinion

United States Court of Appeals for the TENTH Circuit. No 83-2473 and 83-2595 (D.C. no 80-095HB) D. N. M. Merrill Lynch Pierce Fenner and Smith, Incorporated, a Delaware Corporation, Plaintiff, Appellee, vs. Douglas J. Michelson, Defendant, Appellant

Filed:July 19,1984 May Term

In Appeal from the United States District Court for the District of New Mexico , Howard Bratton, District Judge, Presiding

Before Honorable Oliver Seth,Circuit Judge

The court has for consideration in the captioned appeal and cross-appeal appellant's, Michelson's, second motion for extension of time to December 31,1984 , to file a memorandum brief and the motion of appellee, cross-appellant, Merrill Lynch Pierce Fenner and Smith, for extension of time to July 30,to file its memorandum brief.

Upon consideration whereof, the Court denies Michelson's motion, and reaffirms its previous order extending the time for filing his memorandum brief

to July 30. The Court grants the motion of Merrill Lynch Pierce Fenner and Smith for extension of time to July 30, to file its memorandum brief.

No further extensions will be granted and the matter will be submitted to the Court following the July 30th due date on the basis of the record and the memoranda which may have theretofore been filed.

Howard K. Phillips, clerk

IN THE UNITED STATES COURT OF APPEALS

TENTH CIRCUIT

Merrill Lynch Pierce Fenner & Smith,inc.

appellee,

vs. no.83-2473,2595

Douglas J. Michelson,

appellant

MOTION FOR TIME EXTENSION

D.J. Michelson, appearing in the matter, does hereby move the court, ursuant to Federal Rule of Appellate Procedure twenty six (b) , to allow sufficient time for an appeal to be done. Eleven days of record is insufficient time to write an appeal.

As grounds appellant would show the court as follows:

(1.)On July 19,1984 clerk entered

order disallowing an extension for time sufficient to write the appeal. And clerk truncated the normal time allowed in appeal.(see paragraph 5 of motion for extension of time filed July 5,1984.).

(2.)In addition clerk forcloses any added time which might have been granted, had I proceeded and submitted the appeal brief as soon as I possibly could have, by the last sentence of order in which he laid out "which may be heretofore been filed". The court should now recognized this as oppressive nonsence and biasing the appeal.

(3.)The court could have recognized the obvious error or no jury trial in a matter which is only resolvable by a jury trial, and remanded the case for findings by a jury trial as is required. (see revised docketing statement and

motion to dismiss.) It may have wanted a more studied approach in which case it could go to the pretrial order filed in the mattter and then immediately remanded for trial.

(4.)It may have seen the matter further down the road being settled in the New York case, and held the appeal in abeyance. This is certainly an alternate road in keeping with a fair trial on all of the issues. So long as no use was made of res judicata or collateral estoppel there womuld be no problem of utilization of findings which the lower court could not make due to the necessity of the jury making the findings in a trial on the merits.

(5.)This brings us to the current requuest. WE respectfully request that the court not take any action for

another six months and see if the matter is settled in New York. Then if the court want to force two trial or have a lengthly brief of the errors of the lower court, we will be happy to take the three or four months needed and put each and every error on appeal and then try it before a jury.

WHEREFORE appealant, Michelson respectfully ask that the aforementioned appeal be studied for another six months and then sufficient time allowed for writing an adequate appeal.

D.J.Michelson
1503 Central nw.
Albuq. N.M. 87104
(505) 243-1672

-Certificate of Service-

I hereby certify under penalty of perjury that a copy of this was mailed

to opposing counsel of record.

.....d.j.michelson

APPENDIX A

Opinion

United States Court of Appeals for the TENTH Circuit. No 83-2473 and 83-2595 (D.C. no 80-095HB) D. N. M. Merrill Lynch Pierce Fenner and Smith, Incorporated, a Delaware Corporation, Plaintiff, Appellee, vs. Douglas J. Michelson, Defendant, Appellant

Filed:May 22,1984 May Term

In Appeal from the United States District Court for the District of New Mexico , Howard Bratton, District Judge, Presiding

Before Honorable Monroe G. McKay and the HOnorable Stephanie K. Seymour, Circuit Judges.

This matter comes on for consideration of the motion of D.J. Michelson, appellant, to dismiss the captioned appeals and remand the cause to the lower court for transfer and consolidation with the continuation suit in New York, Michelson v. Merrill Lynch, civ 83-8898 MEL (SDNY). The Court has considered the response of Merrill Lynch to the motion.

Upon consideration whereof, it is ordered that the motion is denied on the grounds tha the appeal is from a final order and is not transferable to another court.

Howard K.Phillips, clerk

THE UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

MERRILL LYNCH PIERCE FENNER AND SMITH,INC. ,

appellee,

VS. no. 83-2473

and 83-2595

DOUGLAS J. MICHELSON,

APPELLANT,

* M O T I O N T O D I S M I S S *

Pursuant to rule twenty seven of the Federal Rules of Appellant Procedure,Appellant , Michelson ask that the appeal and cross appeal be dimissed and the case remanded back to the lower court for transfer and consolidation with the contiuation suit in New York, Michelson v. Merrill Lynch civ 83-8898 MEL (SDNY).

As grounds we would show the court the following:

1. that there is no final judgement from which an appeal should lie but a series of opinions prerequisite to a jury trial.

2.that the matter should be tried together with the continuation suit ,as a counterclaim, and not separate for their to be substancial justice.

3.that the matter could not be properly adjudicated as a matter of law.

4.that the prejudical atmosphere in the lower court will necessitate a new judge and further discovery which could best be undertaken in the continuation suit.

5.that the court is ill advised to procede to review on appeal common

matter of law and fact which affects several other suits as well as the continuation suit.

6.that the case is easily recognized as a defensive move on a contract default, undertaken to aborgate Michelson's rights to deliver metal and cover their default on taking delivery of the metal for which they contracted,and fraud him out of the $1.6 million dollars on deposit.

7.It is clearly recognizable as "wringing someone out in a corner" and in no matter a debt.

Wherefore Michelson respectfully prays that the court will dismiss the appeal and cross appeal and remand it to the lower court for transfer and consoldiation with the continuation suit in New York.

D.J. Michelson
1503 Central nw.
Albuq.N.M. 87104

--Certificate of Service--

I hereby certify that a copy of the above was sent to opposing counsel this date. .....d.j.michelson

IN THE UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

MERRILL LYNCH PIERCE FENNER AND SMITH,INC. ,

appellee,

VS. no.83-2473 & 2595

DOUGLAS J. MICHELSON,

APPELLANT,

* M E M O R A N D U M B R I E F *

Statement

The Congress of the United States of America has seen fit to investigate the matter of the "silver bubble" in later 1979 and early 1980, so that those who were cheated by the activity, would have recourse through the courts in the matter and so that those who participated therein would be subject to punishment,and so the public would have preserved to them their free markets and fair prices. This premature appeal caused by the confused rulings of the lower court would abort the intent of Congress and undermine the application of laws fairly to the matter. As such it is gross and apparent error and abuse.

Even absent the extraordinary and critical "corner" situation, Merrill

Lynch has not show the court sufficient evidence of a bonafide sale. Merrill Lynch has not show the court ratification of their acts. They cannot say that their acts provide "performance" in the commerical context of this suit. They have not accounted for the $1.6 million in security monies they so "covet". They have not show Michelson to have been insolvent, bankrupt or unable to perform which they must,to show a right to act. They have not convienced the court that $1.6 million is what they would have been damaged by Michelson's non performance, on contracts whose total face value was $1.2 million. They have not shown how they were insecure, or could as principal be insecure, nor be forced to perform or did perform in his steed.

Most important is that they got caught in the most henious activity possible and should not be allowed to exculcupate themselves from fraud and all fair charges as shown in the continuation suit. They are required to and by law must be tried by the jury upon all of the evidence.

ARGUMENT

The first matter which the appealate court must resolve is whether it can take jurisdiction. In --Oak Const. co. v. Hurron Cement co -- CA Mich 1973 ,475 f2d 1220, the court held that the grant of summary judgment in a antitrust action, was interlocutory, for the reason that the defendants counterclaim for a debt had not yet been adjudicated , and since there was no certification by the district court of

no just reason for delay and express direction for entry of judgement , the court of appeals lacked jurisdiction to entertain the appeal. This would clearly shown the court effort to resolve the whole matter in one case. In this type of antitrust action it is impossible to rule that the acts Merrill Lynch took were separate from the acts of a corner i.e. whether they forced him out of the market. The court clearly recognizes the reversal and that Michelson is the plaintiff.

The fraud counts should stand and be adjudicated with all other counts in one case. IN --TMA Fund v. Biever (CA 3rd 1975)--,520 f2d 641 in an action to recover money under an agreement , where counterclaim under the Securities Exchange Act sought voiding agreement on

ground of fraud and misreprsentation, the USDC granted summary judgment in favor of plaintiff and entry of judgment in favor of defendant . Appealate Judge Garth held that the order which granted summary judgement but which did not adjudicate the counterclaim was not final appealable order but was an interlocutory order. IN addition both had moved for summary judgement where herein Michelson was still awaiting the transcripts, further discovery, and a jury trial. This was HELD even though TMA argued that the grant of summary judgement on its complaint had the effect of disposing of the counterclaim. IN addition the court must consider the case was dealing with a security having an equity value in liquidation, where herein the contract clause "Unless this

is a hedge account" clearly removes it from the treatment accorded wherein certain risks may be assumed by speculative traders. There can be no forced liquidation.

In --Leopold v. Fitzgerald --,421 f2d 839, the court held a summary judgement on one of 11 items of relief was not a final judgement. Further,even though it was confined to one claim,but because of various theories , it was not final. The appealate court should clearly be leary of the removal of all fraud counts. In other cases " a fraud on the market theory" is ongoing, and very proveable against Merrill Lynch. Michelson has replead the matter of fraud in the contiuation suit. In addition there was a 59e motion before the lower court on the fraud rulings,

which the court refused to act upon.

A final decision is one which completely adjudicates the rights of the parties to the suit. --Morgan v. Thompson--IND t 1903,124 f 203 ,59 cca 672. The matters before the court could not be fully adjudicated as a matter of law. Antitrust and fraud are jury matter and for this preliminary motion to dismiss clearly show the court that the matters before the court have not been fully adjudicated and no action by this court is proper.

REVISED DOCKETING STATEMENT OF APPELLANT

Douglas J. Michelson (hereafter Michelson) defendant in the lower court takes this appeal to determine the proper status of all of the cases. The matters are involved now in two suits primarily and several others secondarily. The first case is civ80-095HB Merrill Lynch v. Michelson. The second is the continuation suit 83-1099M Michelson v. Merrill Lynch,ET AL. The other related parts are those suits in New York involving the same law and facts. These are SDNY civ 79-5366 MEL Strax v. Commodity Exchange ,inc., civ 81-7619 Minepeco v. Conti Commodity Services ,inc. et al., civ 82-1318 Gordon v. Hunt and several other suits.

The first matter which the appealate court must resolve is whether it should properly take jurisdiction. There is no final judgement. There is only a series of opinions prerequisite to a jury trial . There is a need for consolidating all suits in the continuation suit.If it does take jurisdiction , then it must then resolve whether the proper things to do is to vacate the judgement and remand it for inclusion as a counterclaim in the continuation suit. This will obviate some of the problems of not including all matters triable in the continuation suit. If the court choses to continue into the matter it then is very complex and certainly the record is replete with injustice demanding vacating the opinions and remanding it for jury

trial .

This case involves the most henious type of activity in the silver market which virtually destroyed Michelson's busness through the devise of a manipulated market. It is the type of case which is almost impossible to try by summary judgement, and which all parts must be tried together to do justice.

Michelson, a dealer in metals ( ), in 1974 established a commercial account for a dealer in metals. Such an account is termed a trade or hedge account. ( )The purpose of the account was to facilitate his business through dealing on a national metal exchange. Michelson always sold metal from his warehouse inventories for delivery as called for in the

contract.The bilateral executor
contracts are standardized calling fo
delivery of metal at a common site.

Merrill Lynch has never performe
under certain of the contracts by takin
delivery of the metal called for unde
the contracts. Merrill Lynch ha
refused to meet the terms of th
contract.

Michelson's contracts to delive
metal called for delivery of metal i
1979,1980,1981,and 1982. As is th
custom of commercial dealers , contract
are entered into and delivered agains
over a period of years. Michelson ha
entered into some of these contracts a
early as 1978.A few of the deliverie
of metal in early 1979 were accepted b
Merrill Lynch and the monies paid wer
deposited in his account. This reduce

Michelson inventories. As is common among merchants in forward contracting, Michelson had only a certain amount of inventory on hand at a given time. However, the commitments made for the delivery of metal , when made , were conservative and well within his capabilities, to deliver.Even at the most extreme point Michelson was NOT insolvent or unable to meet his obligations when due.( )

Generally the raising of the price in a commercial contract three hundred percent over the contract life is considered unconsionable and voids the contract.

The monopolization of the market in silver was a scheme that was put in place and carried out over serveral years. The acts of the conspiracy was

started in full force about August of 1979. Through the dominant position of the conspirators and their combined financial clout the price of silver was raised to an unreasonable level for any commercial purpose. ( )

Merrill Lynch, in carrying out their part in the conspriacy advised their many long accounts to be long and took to demoralizing their "short customers" through various recomendations which were not in the interest of the customer; were not the only way (see englehard) to approach the problem in the market; were not given in good faith. They were used to frighten and extort over a million dollars from Michelson, in a situation they neither intended to fullfill nor did they know was fair or equitable

business practices.

No loss occured until Merrill Lynch took their wrongful and fraudulent acts, which had no basis in law or fact.They were cheating Michelson of his business through the devise of a corner in the market. Michelson refused to now "take their advise" which was ruinious to his business, and which they urged upon him like a sucker, who was trapped.

They threaten him. They carried out a whole series of threatening and manipulative acts. They failed to issue correct calls , as was required of them. They ask for and recieved a financial statement in the confidence of a fiduiciary. They proceeded to use it not to correctly evaluate his worth, which was more than sufficient to meet all obligations, but to pick him clean of

his assets.

Merrill LYnch's first pleading)said, "all calls through the 7th ha been met". They later changed it to no having met the call of the 3rd. Clearl there are several other versions whic "Merrill Lynch" put in the record fro the people in Albuquerque, and then eve more varied and confusing versions fro New York, which they want to disclaim Clearly they were shown to be feedin the succeeding version ( ) wit the prior deposition, to cover up it position.

In 1978, Michelson entered hedging agreement with the local bank This was in keeping with Michelson' business plans. Said document wa reviewed by The Rodey Law firm and the knew of the secrets and confidences o

Michelson. They have herein abused those confidences. The First National Bank IN Albuquerque and Michelson were obligated to provide funds to the account for purposes of carrying on Michelson's business. There are other inferences and interpretation of this document which have been misinterpreted by the court, and mischaracterised by Merrill Lynch.

The court was ask to rule on the disqualification of Merrill LYnch's attorney on several grounds , any one of which might have avoided the appearance of impropriety had the proper hearings been held and proper procedures followed.( )The court must review all of the actions of opposing counsel that are pertinent as shown in the brief.( )

Merrill Lynch was required by the board of trade rules to count days in a certain fashion, and they have chosen in this case to tell the court they count in at least two other ways. This has further confused the matter but necessarily provides controverted material facts for the jury to find fraud. Michelson was counting the way the rules of the Chicago Board of Trade provide.

As early as October Merrill Lynch knew or had reason to know that the government was going to act to end the corner. They ignored this and misappiled it to cheat Michelson. The further understood that even for the largest dealers in the market that it was straining their resources, and arranged other things. No later than January

8,1980 Merrill Lynch's personel knew that the corner would be curbed , that the efffect the exchanges took would insure orderly decreases from the unconsionable prices.

Merrill Lynch on January 10,1980 forced Michelson out of the market , caused his supposed losses and took his money. This act was intentionally undertaken, without cause to destory his business and ruin his life. The transactions which they claim to have made in liquidating his account were fictious. There was no money paid for a thing. There was no money recieved. The witnesses disclaim ever doing anything with Michelson, or that they had an equity to sell or buy or anything of residual value, nor did they perform through the delivery of metal. There

beingno equity in an instrument clearly voids their purported acts. The removal of the contract or any act Merrill Lynch can take,will not remove the obligation to take delivery of the metal under the contracts.

In no circumstances can they cause the impossibility to perform , then wrongly take over to liquidate, fraudulently arrange orders, then claim more money due.

In no area are all the material facts fully before the court, nor are they uncontroverted. The Judge has wrongly taken some in the light most favorable to movant, and ignored the opposing , and more clear and logical facts given by defendant, non-movant. This is error. The judge further mistates those which were controverted

and confuses other facts in his opinions.

To apprise the court of those facts disputed and necessary for trial on the merits of the matters before the court, defendant would refer the court first to the material facts which the Congress of the United States took the time to lay out in its investigation of the matter. The Judge was required on two different occasions to take judical notice of these facts for inclusion in the case and on both he failed to act.

There were extensive hearings held by the different committee of congress into the matters and into issues which relate to the matter. Much was sworn testimony. The facts therein come from many eminent experts or independent sources which are impeachable and have

no axe to grind one way or the other. Matters from the hearings were sought to be introduced into the case and the judge would not allow it or act.

The CFTC and the SEC , two respected agencies of the United States Government , both provided extensive testimony before the committees of the Congress and undertook and published their own investigatitons as well as collected extensive documentation which was not published but which relates and is revelent to this case. The facts and the opinions therein are admissable in proving the alledgations of the counterclaims, which are now the primary claims of the continuation suit. Michelson is entitled to the processes of the court through discovery to compel the testimony and documentation which

will prove his case and allow him to save his business.

Other suits have started discovery and have provided in their records the testimony of knowledgeable attorneys and experts in the field. Michelson sought to introduce as evidence so that the court was not lead to believe that the only support to Michelson case was his testimony,or mislead by the exclusive testimony of the Merrill Lynch group.The only support to Merrill Lynch's meager case is their owntestimony which is riddled with internal inconsistencies, is controverted by Michelson's testimony, and other independent sources. Their witnesses are thoroughly impeached. That is a jury matter.

Michelson engaged the help of several experts. One which was to help

in the investigation of the Chicago deponents was frightened off by threats to her financial well being and future. The court would not respond by providing protection to the witnesses for the defendant. Despite this the court forced the names of other witnesses to be made a part of this record. It will not provide them protection either. Thanks to the Congress of the United States certain others were willing to come forward.

Michelson has ask Merrill Lynch for extensive documentation to its legal , its financial and its political organization. To correctly undertake the antitrust investigation this is necessary. The most minute part of this discovery was denied defendant by the magistrate. Michelson requested in

discovery records which Merrill Lynch keeps in its ordinary course of business on its relationship with N.B Hunt. These were denied. All contain or will lead to revelent facts necessary in the prosecution of this case. Merrill Lynch loaned Hunt in excess of $250 million dollars. This kind of money and its effect on Merill Lynch is to be found in the strategic business plans of Merrill Lynch (both Merrill Lynch Pierce Fenner and Smith,inc. , Merrill Lynch Futures ,inc. a successor organized after the silver bubble, and Merrill Lynch Metals, Inc . which they won't admit they have, as well as other subsidiaries which bear on the questions involved.

Upon information and belief, Merrill Lynch is so organized with the exchanges as to be involved in an

illegal interlocking directorate. Inquires to this and to what it relates is revelent to the case.

The other conspirators , which number 23,have records and acted in concert toward the prime objective. All are discoverable and revelent in this case.

The Supreme Court found that an action was proper against the Exchanges for their part in the corner and in failing to enfore their rules. Discovery of their secret knowledge of the make up of the market at the time and of all of their investigations are necessary to the establishment of certain parameters. This makes discovery of the data banks of this and its operands , the clearing organizations, necessary.

The pre-trial order shows the court

a few of the unresolved quesitons which the court had before it at the time.

APPENDIX B

Opinion

United States District Court for the District of New Mexico No 80-095 HB D.N. M. Merrill Lynch Pierce Fenner and Smith, Incorporated, a Delaware Corporation, Plaintiff, vs. Douglas J. Michelson, Defendant vs. First National Bank in Albuquerque, Garnishee, and First INterstate Bank of Albuquerque, Garnishee,

Filed:Sept. 12,1985

JUDGEMENT AND ORDER TO DISBURSE

This matter having come before the

court upon plaintiff Merrrill Lynch Pierce Fenner and Smith, Inc's (Merrill Lynch) motion to disburse funds and defendant Michelson motion for injunction, and the court having considered the motions and having been fully advised in the premises,

The court now finds:

(1.)This court has jurisdiction over these matters, International Paper co v. Whiteson, 595 f2d 559 (10th cir 1979), except as to defenant's crossclaims;

(2.)Based on this court's final judgment entered on October 21,1983 and the Tenth Circuit's Statement of Costs entered on May 2,1985, a writ of execution was issued by this court on June 17,1985 and served on July 9,1985 upon the First National Bank in

Albuquerque (FNBIA) and First INterstate Bank of Albuquerque (First Interstate).

(3.)FNBIA, in its answer ot the writ or execution advised the court that it was indebted to the defendants in the sum of $814.55 and has requested that it be awarded$450.00 in attorney's fees plus New Mexico gross receipts tax for answering the writ.

(4.)First Interstate answered the Writof Execution and advised the court that it was indebted to the defendant in the sum of $9,220.13.

(5.)Frist INterstate has requested $300.00 in attorney's fees plus New Mexico Gross Receipts tax for answering the writ and defendant's cross claim.

(6.) The motion of Merrill Lynch is well taken.

(7.)FNBIA and First INterestate are entitled to reasonable attorney's fees for filing their answer and replying to defendant's counterclaim.

(8.)Merrill Lynch is entitled to attorney's fees and its costs for service by the United States Marshall.

Now therefore,

IT IS BY THE COURT ORDERED:

(1.)That first National Bank in Albuquerque pay to the law firm of Rodey,Dickason,Sloan, Akin and Robb, P.A. attorneys for the plaifntiff Merrill Lynch, the sum of $553.62.

(2.)That First Interstate Bank IN Albuquerque pay to the law firm of Rodey, Dickason, Sloan Akin and Robb, P.A. attorneys for the plaintiff Merrill Lynch, the sum of $8.907.01

(3.)That First National Bank in

Albuquerque be awarded attorney's fees in the sum of $250.00 plus New Mexico gross receipts tax in the amount of $10.93 for answering the writ of execution.

(4.)That the First INterstate Bank in Albuquerque be awarded attorney's fees in the sum of $300.00 plus New Mexico Gross receipts tax in the sum of $13.12 for answering the writ of execution.

(5.)That upon payment of the aforsaid monies, First National Bank in Albuquerque and Fist Interstate Bank IN Albuquerque shall be released from any further obligation under the writ of execution herein.

(6.)That Merrill Lynch is awarded attorney's fees and its costs for service by the United States Marshall

which amounts shall be added to the balance of the Judgment outstanding in this action.

IT IS FURTHER Ordered that defendant's motion for injunction is denied and defendant's cross claims against First Interstate Bank of Albuquerque and First National Bank in Albuquerque are dismissed.

s/Howard Bratton, Chief Judge.

APPENDIX A

Opinion

United States District Court for the District of New Mexico No 80-095 HB D.N. M. Merrill Lynch Pierce Fenner and Smith, Incorporated, a Delaware

Corporation, Plaintiff, vs. Douglas J. Michelson, Defendant

Filed:AUG 7,1985

MEMORANDUM OPINION AND ORDER

This matter comes on upon the defendant's motion to vacate judgment and to stay execution. Having considered the motion, the memoranda submitted by the parties, and the record, the Court finds that the motion is without merit and should be denied.

On August 3,1983, the court entered a memorandum opinion and Order in this cause finding, in essence, that plaintiff was entitled to summary judgment in its favor. The Court also entered an order dismissing defnedant's remaining conterclaims, after having previously granted summary judgment in favor of the plaintiff on other

counterclaims. The Court entered a Final Judgment in favor of the plaintiff on October 21,1983. Defendant filed a timely noitice of appeal from the final judgment, and plaintiff cross-appealed from certain of the Court's ruling. After granting the defendant several extensions of time within which to file his appellate briefs, and denying his motin to remand and transfer this case for consolidation with a cause pending in another district, the Court of Appeals for the Tenth Circuit dismissed his appeal for lack of prosecution, on January 22,1985. The court affirmed this Court's rulings from which the plaintiff had cross appealed. The mandate was issued contemporaneously with the filing of the Court's order dismissing the appeal. Defenant's subsequent petition

for rehearing , which the court of appeals treated as a petition to recall the mandate, was denied on April 4,1985.

Defendant has now moved to vadate the final judgment pursuant to rule 60 (b), Fed.R.Civ.P.He has also moved to stay execution of the judgment, pursuant to Rule 62 (b) Fed. R. Civ. P. Defenant claims tha the judgment should be vacated becasue it is void. Rule 60 (b) (4) provides for the vacation of a void judgment. However, the defendant has filed to present any grounds which indicate that the judgment is void, or any grounds for relief from this judgment under the other provisions of Rule 60(b) .

Defendant's brief in support of this motion consists of a number of

contentions that the Court erred in regard to such matter as defendants's claimed right to a jury trial , denial of his right to ocunsel, and denial of his right to due process of law. "A judgment is not void merely because is (SIC) is erroneous. It is void only if the court that rendered it lacked jurisdiction of the subject-matter, or of the parties, or if it acted in a manner inconsistent with due process of law. "11 Wright and Miller, Federal Practice and Procedure # 2862. The court has considered defendant's contentions in support of this motion and concludes that his claimed right to a jury trial and to the effective assistance of counsel were not violated, and that he was afforded due process of law at every stage of this proceeding. Moreover, each

of the issues raised in this motion could have been raised in and considered by the court of appeals had defendant diligently prosecuted his appeal.

The final judment in this casue is not void, nor has defendant presented grounds for relief from the judgment, under any of the other providiosn of rule 60(b) This being so, defendant's motion to stay execution pursuant to rule 62(b) shall also be denied.

Now therefore,

IT IS BY THE COURT ORDERED that defenant's motion to vacate jdugment and to stay execution is denied.

s/Howard Bratton, Chief Judge

APPENDIX

Opinion

United States District Court for the District of New Mexico No 80-095 HB D.N. M. Merrill Lynch Pierce Fenner and Smith, Incorporated, a Delaware Corporation, Plaintiff, vs. Douglas J. Michelson, Defendant

Filed:Oct 21,1983

FINAL JUDGMENT

This matter has come before the court on the following motions of plaintiff Merrrill Lynch,Pierce,Fenner, & Smith, Inc. (hereafter Merrill Lynch): Motion for Summary Judgment on the Second Amended Complaint and Amended Counterclaim filed March 31,1981; Motion for Summary Judgment filed May 13,1983; Motion for Order Dismissing Amended

Counterclaim and Entry of Default Judgment filed May 13,1983. The court has entered three separate Memorandum Opinions and Orders to the following effect: By its Memorandum Opinion and Order entered August 12,1982, the Court granted plaintiff partial summary judgment dismissing with prejudice Countr I through VIII and Counts XIII through SV (sic) of defendants Amended Counterclaim. By its Memorandum Opinion and Order entered August 3,1983, the Court dismissed the remaining counts of the defendant's Amended Counterclaim, namely , Counts IX through XII and Count XVI, without prejudice, for defendant's failure to comply with the Court's discovery and pretrial orders. By a separate Memorandum Opinion and Order entered August 3,1983, the Court granted

plaintiff's motion for Summary Judgment upon its Second Amended Complaint.

NOW THEREFORE:

IT IS HEREBY ORDERED< ADJUDGED AND DECREEED that Counts I through VIII and Count XIII through XV of defendant's Amended Counterclaim be, and they heregy are dismissed with prejudice, consistent, wiht the Court Memorandum Opinion and Order of August 12,1982 granting plaifntiff partion summary judgment.

IT IS FURTHER ORDERED, ADJUDGED AND DECREEED that Counts IX through XII and Count XVI of defendant's Amended Counterclaim be, and they hereby are ,dismissed without prejudice, consistent with the Court's memorandum Opinion and Order of August 3,1983 imposing ccertain sancitons against defendant for his

failure to comply with the Court's discovery and pretrial orders.

IT IS FURTHER ORDERED , ADJUDGED AND DECREED that, consistent with the Court's memorandum Opinion an dOrder of August 3,1983 granting plaintiff a summary judgment on its Second Amended Complaint, plaintiff do have and recover judgment on such Second Amended Complaint against defendant, as follows: For the principal sum of $117,806.19 together with interest thereon at the rate of ten percent(10%) per annum from January 10,1980, until such judgment is paid in full; for its reasonable attorney's fees in the sum of $33, 335.70 incurred in collecting such indebtedness, and for the costs of this action as taxed by the Clerk of the Court.

s/Howard Bratton, Chief Judge

APPENDIX B

Opinion

United States District Court for the District of New Mexico No 80-095 HB D.N. M. Merrill Lynch Pierce Fenner and Smith, Incorporated, a Delaware Corporation, Plaintiff, vs. Douglas J. Michelson, Defendant

Filed:Oct 21,1983

MEMORANDUM OPINON:

This matter comes before the Court on Plaintiff's motion for entry of judgment. Having considered the authorities, the arguments of the parties and the entire record, the Court concludes that the motion should be granted.

Plaintiff submits its proposed judgment in accordance with the Court's order of August 3,1983, granting summary

judgment on the Second Amended Complaint. Plaintiff seeks to incorporate into the judgment an award for attorney's fees pursuant to NM Stat. Ann Sec 36-2-39 (1978) which provides that in an action upon an open account "the prevailing party may be allowed a reasonable attorney fee set by the court , and taxed and collected as costs." The court finds this is an action upon an open account within the meaning of NM STAT Ann Sec 36-2-39 (1978) and that plaintiff should be awarded attorneys' fees in the amount requested.

Plaintiff also seeks that attorneys'fees awarded it by Order of the Magistrate dated September 14,1982. It is unclear whether the time spent in defending the frivolous motions for which those fees were awarded is also

included in the "Summary of Hours Spent" submitted in support of this motion. To avoid any possible duplication, the fees awarded by the Magistrate will not be included in the final Judgment to be entered in conjunction herewith.

s/Howard Bratton, United States District Judge

APPENDIX B

Opinion

United States District Court for the District of New Mexico No 80-095 HB D.N. M. Merrill Lynch Pierce Fenner and Smith, Incorporated, a Delaware Corporation, Plaintiff, vs. Douglas J. Michelson, Defendant

Filed:Aug 3,1983

MEMORANDUM OPINION AND ORDER

This matter comes before the Court on plaintiff's motion for summary judgment. The Court has entered herewith a Memorandum Opinion and Order dismissing the Amended Counterclaim without prejudice; therefore, this Opinion addresses only that portion of plaifntiff's motion which requests summary judgment on the Second Amended

Complaint. Merrill LYnch asks for reconsideration of the Court's denail of its former motion for summary judgment on the Second Amended Complaint. Having considered the arguments of the parties, the authorities, and the entire record, the Court now concludes that Merrill Lynch is entitled to summary judgment.

The following material facts are undisputed: On December 13,1976, Michelson and Merrill Lynch executed a Commodity Account agreement which contained a "no waiver clause:"

"Merrill Lynch shall have the right, whenever in our discretion we considered it necessary for our protection,...to sell any or all securities and commodities

in your account(s) with us (either individually

or jointly with others) to buy any or all

securities and commodities which may be short

in such account(s) and to close any or all

outstanding contracts, all without demand

for margin or additional margin, notice of

sale or purchase ,or other notice or advertise-

ment.....it being understood that a prior demand,

or call, or prior notice of the time and place

such sale or purchase shall not be considered a

waiver of Merrill Lynch's right to sell or

buy without demand or notice as herein provided;

and it being further understood that you shall at

all times be liable for the payment of any debit

balance owing in your account(s) with us upon

demand and that you shall be liable for any

deficiency remaining in any such account(s) in

the event of the liquidation thereof in whole

or in part by us or you."

From October, 1978, through January 9,1980, Michelson traded on margin in gold and silver futures through his

account at Merrill Lynch. In late 1979 and early 1980 the commodities market experienced an unprecedented rise in the prices of gold and silver. This in turn generated significant losses in Michelson' s account, resulting in more frequent and higher margin calls by Merrill Lynch.

On January 3,1980 , Merrill Lych issued Michelson a margin call in the amount of $220,336. Both parties calculated that the call had to be paid no later than the fifth business day after issuance. Merrill Lynch counted the date of issuance thereby calculating that the January 3d call was due January 9,1980. Michelson began counting with the day after issuance and calculated the call to be due January 10th. Michelson delviered $175,000 in stock to

Merrill Lynch on January 7th; $45,336 of the call then remained outstanding. On January 10th Michelson's account was liquidated leaving a debit balance of $117,806.19, the amount which Merrill Lynch seeks to recover in the second amended Complaint.

Michelson relies on representation made to him on Jan 10th by Forrest Smith, the office manager of Merrill Lynch's Albuquerque Ofice, who was in charge of Michelson's account. Michelson had advised Smith that he womuld deliver $85,000 on January 11th to satisfy the balance of the call. Smith testified in his depostion that he may have responded to this information with the comment, "That's good." Smith did not inform Michelson that a deposit of $85,000 on January 11th would be too late.

Michelson argues that Smith's comment "That's good. "conveyed the impression that his proposed deposit would be timely and sufficient. Nevertheless, assuming that Smith did make the comment and that a reasonable man womuld interpret it as Michelson did, under the terms of the Commodity Account Agreeement Merrill Lynch was still entitled to liquidate Michelson's account.

The market at the time was exceedingly volatile, to the extent that Congressional hearings were held to investigate the causes. Michelson had been issued another call January 7,1980 .Even had Michelson deposited the $85,000 on January 9th, Merrill Lynch would still have been undermargined and insecure. The Commodity Account

Agreement gave Merrill Lynch the right to liquidate Michelson's account whenever in it discretion it considereded that action necessary for its protection. Merrill Lynch considered liquidation of Michelson's account to be necessary for its protection. There is no evidence that Merrill Lynch's anxiety was unjustified.

Merrill Lynch was not obligated to give Michelson prior demand or notice of its decision to liquidate; Michelson expressly waived them. Further , even though Merrill Lynch had given demand or notice and assuming Smith had promised that the account would not be liquidated if Michelson delivered the $85,000. on January 11th, this representation would not invalidate the "no-waiver clause". Schenck v. Bear, Stearns & co.

484 f supp937,949 (SCNY 1979);Bruun v. Shearson Hayden Stone, Inc. (1977-80 transfer binder) Comm Fut Law Rep. CCh para 20814 (CFTC Apr 1979).

Now therefore,

IT IS ORDERED that plaintiff's motion for summary judgment on the Second Amended Complaint is granted. Plaintiff is awarded costs of this action and interest from the date the debt became due.

Plaintiff will submit a proposed form of Judgment after having submitted it to defendant for approval as to form.

s/Howard Bratton, United States District Judge

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APPENDIX B

Opinion

United States District Court for the District of New Mexico No 80-095 HB D.N. M. Merrill Lynch Pierce Fenner and Smith, Incorporated, a Delaware Corporation, Plaintiff, vs. Douglas J. Michelson, Defendant

Filed:Aug 3,1983

MEMORANDUM OPINION AND ORDER

This matter comes before the Court on plaintiff's motion for order dismissing Amended Counterclaim and Entry of Default Judgment. Having considered the authorities, the arguments of the parties and the entire record, the court concludes that the motion should be granted in part and denied in part.

This suit was filed February 6,1980. The Second amended Complaint was filed February 17,1981 and defendant's Answer and Amended Counterclaim shortly thereafter. In June, 1982, over two years after the case was filed,defendants moved to add 23 parties and file a Second Amended Counterclaim asserting 37 separate claims , most of which had not been asserted previously. Because of the prejudice to the plaintiff and the inevitable delay in bringing to trial the issues already before the court, this motion was denied. On August 12,1982 the court granted in part plaintiff's motion for summary judgment, disposing of many of the issues in the Amended Counterclaim.

Michelson's counsel withdrew from the case on June 1,1981 and the

defendant has been proceeding pro se since that date. On October 7,1982 Michelson was admonished in open court concerning his conduct in the case. Michelson had filed a number of pleadings which displayed an attitude of contempt for the court and the Magistrate who was handling the discvoery proceedings. IN addition to instructing him not to file any more such pleadings, the court informed MIchelson that if he prevented the orderly proceesssing of the lawsuit he might suffer default judgment on the Second Amended Counterclaim.

In spite of this admonition Michelson continued to obstruct the course of discovery and the orderly processing of the lawsuit. He refused to answer interrogatorries fully and in

good faith, identify or produce documents he intended to use at trial , indentify expert witnesses he intended to call at trial , or participate in the filing of a pre-trial order. Michelson consistently ignored the court's ruling on the summary judgment motion, the motion to add parties and file a second Amended Counterclaim, and discovery deadlines. He abused the procedures for deposing prospective witnesses. Michelson appeared to believe that he alone could dictate which issues were to be tried, against whom and when.

As a result of Michelson obstructive tactics and in an effort to get the case ready for the August 16,1983 trial setting, the court ordered Michelson to identify the expert witnesses he intended to use a trial

,identify and produce for plaifntiff's inspection all documents he intended to introduce at trial, and complete and file a pre-trial order strictly in accordance with Local rule 24 and the approved form of pre-trial order. Defendant was put on notice that failure to comply wiht the order in any respect would result in default judgment and dismissal.

Michelson filed a "proposed pre-trail (sic) Order," within the time set by the order. Merrill Lynch contends that he document does not shed any light on the manner in which Michelson intends to present his claims or help Merrill Lynch in any way in preparing its defense to the Amended Counterclaim.

The "Proposed Pre-Trail Order" was numerous defects. It ignores in several

respects the Order of August 6,1982 denying Michelson motion to add parties and the Order of August 12,1982 granting summary judgment in part. It does not incorporate any portion of the Pre-Trial order outlining plaintiff's position which Merrill Lynch submitted to Michelson. It contains ten pages of contested issues of fact, many of which have no relevance to the lawsuit and some of which are unintelligible.

Although the "proposed Pre-trial Order" contains extensive lists of documents and witnesses Michelson proposes to use at trial, the documents and witnesses are not identiified in any maningful way. IN short, Michelson's "proposed pre-tr_al order" does not inform the court or Merrill Lynch of the factual basis of defendant's claims or

the legal theories on which he relies.

As a consequence the court is compelled to find that the Amended Counterclaim cannot now be tried. As stated in the Order of June 21,1983, "the case (particularly the Amended Counterclaim) is far from being in a justiciable posture." Although given the opportunity to rectify the situation to the extent possible by filing a comprehensive and focused pre-trial order, Michelson failed to do so. Accordingly, the Amended Counterclaim will be dismissed. Out of an abundance of fairness to Michelson who is proceeding pro se, dismissal will be without prejudice. Mcihelson has filed another suit in this District which is essentially the same as the Second Amended Counterclaim he attempted to

file herein. The suit is similar to other suits now pending before federal court's in New York and Michelson has raised the possibility of transferring his newly filed csae to New York for consolidation with the other suits stemming from the colapse of the silver market in 1980, or possibly proceeding as a member in a class action pending there. In any event it is clear to this court that Michelson is not capable of processing his claim by himself, and he maintains that he has been unable to obtain an attorney to represent him. Therefore, dismissal without prejudice will enable him to attempt to place his claim in a posture where it can be considered on its merits.

Now therefore,

IT IS BY THE COURT ORDERED that the

Amended Counterclaim is dismissed without prejudice. Plantiff's motion for default judgment on the Second Amended Complaint is deneid.

s/ Howard Bratton ,United States District Judge

APPENDIX B

Opinion

United States District Court for the District of New Mexico No 80-095 HB D.N. M. Merrill Lynch Pierce Fenner and Smith, Incorporated, a Delaware Corporation, Plaintiff, vs. Douglas J. Michelson, Defendant

Filed:Aug 12,1982

MEMORANDUM OPINION AND ORDER

This matter comes before the Court

on plaintiff's motion for summary judgment on the Second Amended Complaint and Amended Counterclaim. Having considered the arguments, evidence and exbibits submitted by the parties and the entire record, the court concludes that the motion should be granted in part and denied in part. CountsI through VIII and XIII through XV of the Amended Counterclaim will be dismissed. material issues of fact remain as to the matters alleged in the Second Amended Complaint and Counts IX, X, XI, XII, AND XVI, of the amended counterclaim, therefore , plaintiff's motion to that extent will be denied.

Plaintiff, Merrill Lynch, Pierce, Fenner & Smith,inc., ("Merrill Lynch") brought this action to collect the deficit balances in defendant's

non-discretionary commodities futures trading account which remained after the account was liquidated on January 10,1980. Defendant Michelson is a dealer in precious metal . From October ,1978 to January 9,1980 he traded on margin in gold and silver futures through an account at Merrill Lynch. His account was liquidated at the peak of an histroic rise in silver prices after defendant alledgedly failed to meet a margin call. Defenant counterclaimed alledging breach of contract, violation of serveral provisions of the Commodities Exchange Act ' USC 1 et seq. ("CEA"),negligent misrepresentation and fraud, and claims under the Sherman and Clayton acts.

Counts II, IV VI and XIV of the Counterclaim are founded upon certain

alledged acts of negligence made by Merrill Lynch in servicing defendant's commodities account. Defenant asserts that these acts violated / (4(b) of the CEA. It is clearly the law of the Tneth Circuit, as well as other Circuits, that recovery under the / 4(b) "must be based on fraud or willfull conduct, and not mere negligence, mistake or inadvertence." Masters Commodities,inc. v. Texas Cattle Management, 586 f2d 1352, 1355 (10th cir 1978);Commodity Futures Trading Commission v. Savage ,611 f2d 270 (9th cir 1979); Silverman v. Commodity Futures Tradiung Commission, 549 f2d 28,33, (7th cir 1977). Accordingly ,Counts II,IV,VI and XIV will be dismissed.

In count I defendants charges that

Merrill Lynch intentionally failed to advise him that the risks involved in his dealings with it had changed because of its releasee to defendant of $575,000 worth of commercial commodity warehouse receipts. Defendant contends that this was a failure to fullfill a fiduciary duty, which operated as a fraud, violating both / 4(b) of the CEA and the rules and regulations of the Commodities Futures Trading Commission. Count V also charges Merrill Lynch with the breach of a fiduciary duty , ie. the intentional failure to advise Michelson that the initial margin requirements on his contracts could be retroactively raised.

Merrill Lynch argues that Count I and V must be dismissed because no fiduciary relationship existed between

the parties, citing several cases to the effect that the fiduiciary duties of a broker are limited to the faithful execution of the customer's orders. Shearson Hayden Stone, inc. v Leach, 583 f2d 367 (7th cir 1978); Leib v. Merrill Lynch Pierce Fenner and Smith,inc, 461 f.supp 951 (E.D. Michigan 1978) .Robinson v. Merrill Lynch Pierce Fenner and Smith,inc. 337 f supp 107 (N.D. Ala 1971).Although none of the cases cited by plaintiff considered whether a broker has duties like those relied on in Counts I and V , it is clear that Merrill LYnch has only limited fiduiciary duties which would support a judgment for the defendants on Count I and V. As to Count V, the court also finds that defendant was advised that Merrill Lynch might raise margin

requirements on his existing positions in paragraph one of the parties' Commodity Account Agreement which incorporated the rules and regulations of the Chicago Board of Trade. Rule 430 expressly authorizes brokers to set margins in excess of those required by the exchange.

Count III,VII, and VIII involve Merrill Lynch's alledged failure to issue proper and accurate margin calls. Merrill Lynch has submitted evidence showing that the margin calls it issued to defendants were proper and accurate. Defendant having introduced no evidence to the contrary , summary judgment is appropriate on these counts. (While the testimony of one of plaintiff's employees seems to support defendant's claims of inaccurate calls , this

apparent contradiction was later explained by plaintiff. Defendant has not refuted or questioned plaintiff's explanation.)

In counts XIII,XIV, and XV defendant charges that Merrill Lynch failed to give effect to a three party agreement between Merrill Lynch , Michelson and the First National Bank of Albuquerque ("the bank"), entitled "Security Agreement--Assignment Of Hedging Account." Paragraph 3 of the agreement authorized Merrill Lynch to call upon the Bank to advance amounts to meet margin calls on Michelson's account. It is undisputtted that plaintiff's Corporate Credit Department in New York was unaware of this agreement. That same Paragraph 3, however also provides that "Nothing

contained herein shall be construed to prevent or in any way limit the rights of the Broker to liquidate the account whenever, in the Broker's discrestion, the broker deems it necessary to protect its interests. " Thus, plaintiff was not in any way obligated to resort to the Bank. Furthermore, Merrill Lynch has introduced unrefuted evidence that both the Bank and the Albuquerque Merrill Lynch office which executed the agreement intended it to operate only as an interim measure until the Bank had physical possession of the warehouse receipts which the agreement secured. Summary judgment ,therefore, will be granted as to these Counts.

Summary judgment on the Second Amended Complaint will be denied. The present deadlines for discovery and

filing of pre-trial motions having beenn redered obsolete by this decision, the case will be referred to the Magistrate for ruling on pending discovery motions and setting of new deadlines. In addition, the court has considered all pending motions for reconsideration of the Magistrate's decisions and, with the exception of the motion dated July 27,1981 which is referred to the Magistrate along with the other discovery motions, finds that they are without merit.

Now,therefore IT IS BY THE COURT ORDERED THAT:

Plaintiff's motion for Summary Judgment dismissing Count I,II, III,IV,V,VI,VII,VIII, XIII, XIV, and XV of the Amended Counterclaim is granted. Plaintiff's motion for Summary Judgment

on the Second Amended Complaint and counts IX,X, XI,XII,and XVI of the Amended Counterclaim is denied.

Motions for reconsiderations or review of the Magistrate's Decisions dated February 20,1981, July 23,1981, August 5,1981, and November 3,1981 are denied.

s/Howard Bratton, Chief Judge

APPENDIX B

Opinion

United States District Court for the District of New Mexico No 80-095 HB D.N. M. Merrill Lynch Pierce Fenner and Smith, Incorporated, a Delaware Corporation, Plaintiff, vs. Douglas J. Michelson, Defendant

Filed:Aug 6,1982

O R D E R

This matter comes before the Court on defendant's motion to add parties and file a Second Amended Counterclaim. Defendant seeks therein to add twenty three parties and twenty one claims. This motion comes over two years after the case was filed and three months after the close of discovery. Because granting the motion would substantially delay disposition of the case and unduly prejudice the opposing party, the court finds that the motion is not well taken and should be denied.

While the granting or denying of a motion to amend is within the discretion of the court, Zenith Radio Corp v. Hazeltine Research 401 US 321, 330 (1971) ,if the trial of the issues would

be unduly delayed or the opposing party unduly prejudiced, the motion should be denied. Id . 3 Moores's Federal Practice and Procedure 15.08 at 15-62 (2d ed 1982) There is no doubt that the addition of twenty-three claims womuld require substantial additional discovery. This would cause a great increase in expense to the plaintiff and delay the trial of the issues already before the court. It is also apparent , in view of the parties and claims defendant seeks to add, that these could be more conveniently litigated in another district. 18 USC 1404(a).

Now ,therefore IT IS BY THE COURT ORDERED that defendant's motion to add parties and file a Second Amended Counterclaim is denied.

s/Howard Bratton, Chief Judge.